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No. 15-290

IN THE

Supreme Court of the United States

UNITED STATES ARMY CORPS OF ENGINEERS,

Petitioner,

v.

HAWKES CO, INC., et al.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF *AMICUS CURIAE* OF ERNEST M. PARK AND LAUREN KENT PARK IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Is a Jurisdictional Determination that is conclusive as to federal jurisdiction under the Clean Water Act, and binding on all parties subject to judicial review under the Administrative Procedure Act?

RULE 29.6 DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, *amici curiae* state the following:

Ernest M. Park is a natural person and has no ownership interest in any party.

Lauren Kent Park is a natural person and has no ownership interest in any party.

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INTEREST OF *AMICI CURIAE*[1]

Ernest M. Park and Lauren Kent Park are residents of the State of Connecticut. They own property in Fairfield County, Connecticut which is zoned for residential use. Mr. and Mrs. Park have spent their life savings to purchase the property. The property was unimproved when purchased, except for an abandoned gravel driveway.

The Parks have spent tens of thousands of dollars and several years to obtain all required local and state approvals to improve their property and build a house thereon. After they had obtained the local and state approvals and had begun work to improve a preexisting gravel driveway leading from the public roadway to the site of their ;proposed house on the property, the United States Army Corps of Engineers ("USACE" or "Corps") asserted that it had regulatory jurisdiction because the property contained a regulated wetlands. The Corps demanded that the Parks halt work and obtain one or more federal permits.

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[1] The parties have consented to the filing of *amicus* briefs in support of either of either party and such consents are on file with the Clerk of the Court.

Pursuant to Rule 37.6, *amici* affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief.

The Parks then spent three additional years and additional tens of thousands of dollars challenging the Corps district engineer's jurisdictional determination ("JD"), only to have the JD affirmed by the Corps' regional office.

In addition, the Parks have paid, and will continue to have to pay, thousands of dollars of state and local real property taxes each year on their property which has been rendered useless because of Corps's threats to impose harsh and burdensome fines and penalties if they improve the driveway and the property without obtaining federal permits.

The Parks wish to challenge the JD in federal court, but if the Court reverses the Eighth Circuit's decision in this case, the Parks will be unable to afford the additional hundreds of thousands of dollars and approximately two years to pursue the federal permitting process before they can obtain review by an impartial Article III court.

INTRODUCTORY STATEMENT

The Clean Water Act ("CWA") authorizes the Corps of Engineers to regulate certain discharges to "navigable waters" or "waters of the United States." 33 U.S.C. §§ 1311(a) & 1362(7). The term "navigable waters" has been defined by the Corps in different ways over time. This Court defined the term in *Rapanos v. United States*, 547 U.S. 715 (2006). The plurality defined "navigable waters" as Traditional Navigable Waters (capable of use in interstate commerce) ("TNW") and nonnavigable but relatively permanent rivers, lakes, and streams, as well as abutting wetlands, with a continuous surface water connection to Traditional Navigable Waters. *Id.* at 739-42. In a concurring opinion, Justice Kennedy said that the CWA covered wetlands with a significant physical, biological, and chemical impact on Traditional Navigable Waters. *Id.* at 779.

The "reach of the Clean Water Act is notoriously unclear. Any piece of land that is wet at least part of the year is in danger of being classified as wetlands covered by the Act " *Sackett v. Envtl. Prot. Agency*, 132 S. Ct. 1367, 1375 (2012) (Alito, J., concurring), and since 1972, when the Act came into effect, "[t]he Corps has [] asserted jurisdiction over virtually any parcel of land containing a channel or conduit – whether man-made or natural, broad or narrow, permanent or ephemeral – through which rainwater or drainage may occasionally or intermittently flow " *Rapanos*, 547 U.S. at 722. This implicates "the entire land area

of the United States." *Id.* "Any plot of land containing such a channel may potentially be regulated as a 'water of the United States.'" *Id.*"[2]

By regulation, Corps' district engineers are authorized to determine the applicability of the Clean Water Act "to activities or tracts of land and the applicability of general permits or statutory exemptions to proposed activities." 33 C.F.R. § 320.1(a)(6). A formal Approved Jurisdictional Determination ("JD") provides a delineation of wetlands or other waters subject to regulation under the Clean Water Act, along with detailed physical, chemical, based on site specific biological and other data. 33 C.F.R. § 331.2. A determination pursuant to this authorization shall, in the words of the regulation itself "constitute a Corps final agency action." 33 C.F.R. § 320.1(a)(6).[3]

A Jurisdictional Determination requires property owners to: seek a permit, proceed with use of the land without a permit, risking civil and

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[2] In an earlier decision, the Eighth Circuit had held that the Corps can establish federal jurisdiction over wetlands under either the plurality's "continuous surface water" test or Justice Kennedy's "significant nexus" test. *See United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009).

[3] It is noteworthy that the Corps' regulations also provide for Preliminary JD's that indicate that there may be "waters of the United States" on a parcel. 33 C.F.R. § 331.2, and characterize these preliminary JD's as "advisory in nature" and that they "may not be appealed." Pet. Opening Brief at 25(a).

criminal penalties, or abandon use of the regulated portion of the land; ruinous fines. *See* Pet. Opening Brief at 9 n.4.

Corps regulations authorize an administrative appeal of an "approved judicial determination." The procedure for such an appeal is the same as that for an appeal of a denial of a permit.[4]

In 2004 *amici* purchased an eight (8) acre wooded building lot plus a six (6) acre parcel that was a "conservation easement"[5] in Weston, CT for approximately $212,000. The building lot is zoned for single family residential use. *Amici* planned to purchase and install a modest modular home on the property, at a cost of $285,000, including site preparation, foundation, customization, and septic system.

Over a three year period *amici* applied for local permits to repair a pre-existing gravel driveway[6]

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[4] *See* 33 C.F.R. § 320.1(a)(2) ("A district engineer's decision on an approved jurisdictional determination, a permit denial, or a declined individual permit is subject to an administrative appeal by the affected party in accordance with the procedures and authorities contained in 33 C.F.R. part 331.").

[5] The easement had been demanded by the town conservation commission from a prior owner.

[6] The driveway had been built in the mid 1980s by a previous owner of the property. It is approximately 1,300 feet (one quarter mile) long, and runs from a cul de sac that

(continued...)

and underground utilities on the property (17 times in total). They hired multiple engineering firms and law firms, did test borings and other work required by town authorities and satisfied the concerns of the town conservation commission. In January 2007 the Parks received a permit from the town to repair the existing driveway so that delivery vehicles and construction equipment could reach the location in the interior of their lot where they wanted to build their home.

Amici spent approximately $205,000 in consultant and legal fees, plus an additional $33,000 for sanitation permits and underground pipes the town conservation commission required them to install for drainage and to enable turtles to cross under the driveway. In total, they spent at least $240,000 – more than they had paid for the land itself – for permits and preliminary work demanded by the state conservation commission,

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[6](...continued)
is a public street to an elevated knoll on the property on which the *amici* planned to build the house. Vegetation had been cleared to put the driveway in, but it had grown back and the driveway had fallen into disrepair. The driveway needed to be upgraded to permit it to be used by heavy vehicles needed to transport the house modules to the place the house was to be built. In the 1800s there had been an old "corduroy" road at the same location; that road had been used to transport trees, logs and timber that was harvested from the forest on the property.

even before the Corps got involved.[7] *Amici* made preparations to repair the driveway, including purchasing gravel and drainage pipes and retaining a contractor.

But in late September 2008, after they had started work on the driveway and had put down a substantial amount of base material, as the town had authorized (and just weeks before completion of the driveway repair), the Corps sent a cease and desist letter, threatening the daily fines and imprisonment if *amici* took any further steps to prepare the site of the house or repair the gravel driveway.[8] *Amici* sent a reply asserting that the Corps has no jurisdiction, but stopped work rather than risk ruinous penalties.[9]

In discussion with Corps' officials it became apparent that the agency believed, incorrectly, that the property was directly adjacent to a river; in fact the river is about 60 miles from the property. *Amici* described the location of the property and the river and submitted a letter from

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[7] In addition to these direct costs of obtaining approvals, the Parks have paid approximately $60,000 in real estate taxes on the property since purchasing it.

[8] The Corps stopped the Parks from installing the pipes after having initially told them orally that the Corps had no issue with installation of the pipes. The Corps also stopped *amici* from excavating foundation of the house.

[9] The 36-inch diameter pipes are still lying on the property, deteriorating.

their engineer stating that the property has no connection whatsoever to any navigable waterway.

From December 2008 to March 2010 *amici* tried to arrange an on-site meeting with the Corps; meetings were scheduled and cancelled several times, mainly due to frequent changes in personnel at the Corps' district office.

In June 2010 a Corps project manager finally came to the site and walked the property, the neighboring properties and beyond. Weeks later the Corps' project manager proposed that *amici* apply for an "after the fact" permit, and agree to "mitigation" measures.

In August 2010, *amici* asked the Corps' project manager to explain how isolated "wetlands" on their property have any relation to "navigable waters" or interstate commerce. The response was an email threatening to refer the case to the Environmental Protection Agency ("EPA") if *amici* did not respond in writing regarding "unauthorized" activity on the property. *Amici* responded by sending the Corps' their full engineering report that showed that any "wetlands" on the property had no connection to interstate or navigable waters.

It was not until mid-August 2012, more than two years after she had seen the property first hand, that the Corps' project manager replied that she was in the process of completing a formal Jurisdictional Determination ("JD"). In fact it was not until a month later, more than *five years* after

amici had obtained town approvals, and *four years* after the Corps' initial "cease and desist" letter, that *amici* received a letter from the Corps stating the Corps' district office had determined the "wetlands" on the property are "jurisdictional" and reiterating that *amici* were in violation of Corps regulations.

By early December 2012 *amici* had still not received a copy of the final JD, and they again requested it, along with all information used in developing the Corps' final determination, including data, maps, photographs, and other documentation the Corps. A month later, on January 10, 2013, *amici* received the JD and a "tolling agreement."

On April 18, 2013 *amici* submitted their appeal of the JD to the Corps' "Regulatory Appeals Review Officer." A few weeks later they met with the Review Officer, the Corps' Project Manager and a Corps' Senior Soil and Wetland Scientist at the property. The Review Officer later upheld the District's Jurisdictional Determination.

Amici then appealed the Review Officer's decision to the North Atlantic Division of the Corps. It was not until January 2014 that they received an "Administrative Appeal Decision" upholding the District Engineer's "approved jurisdictional determination." The cover letter from Commanding General of the Corps' North Atlantic Division stated "*My decision on your request for appeal concludes the administrative appeal process*. However, this does not preclude

you from filing a permit application for any work you propose in the jurisdictional areas." (Emphasis supplied.)

The JD process itself took almost six years, and the *amici* incurred tens of thousands of dollars in costs for engineering, hydrology and environmental experts' reports. Their out of pocket expenditures during the JD process are almost equal to the amount recited in *Rapanos* as the amount required to obtain a permit. The delays imposed on them during the JD process exceed substantially the time stated in *Rapanos* for the permit process.[10] The costs and delays *amici* have incurred in the JD process do not, of course, include the additional time and expense they would necessarily incur if they were to submit to the Corps' detailed, exhausting, time-consuming, and expensive permit process, which, according to *Rapanos*, would approximately double the costs and delays.

Amici are individuals of modest means – Mr. Park is a computer engineer and the Parks own

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[10] In addition to direct costs to *amici* of the Corps' permit process, the Parks paid approximately $163,000 to rent a house to live in for the four years after receiving local approvals and during the period the Corps was "working on" its jurisdictional determination, a cost which would have been unnecessary had they been able to build the house on the property in a reasonable time. They also paid about $30,000 in real estate taxes on the empty, but otherwise buildable, lot during that same period. They continue to incur those costs to this day.

and operate a small business that provides computer consulting services to other small and medium-sized businesses. They have expended their life savings to buy the land, obtain local permits and deal with the Corps during the JD process. Their experience with local and federal processes for accomplishing the simple goal of building their modest "dream home" has drained them of their financial resources and physical energy.

In *Rapanos*, 547 U.S. at 721, this Court noted that the wetlands permitting process under the CWA took on average more than two years and costs on average more than $271,000.[11] The *Rapanos* plurality's estimate of the burden imposed on landowners by the Corps' permitting process is, if anything, understated. In the experience of *amici*, the multi-year and several hundred thousand dollar process (including obtaining local and state permits, the JD process, followed by the permit process) imposes delay after delay and immense costs on property owners. The actual experience of *amici* illustrates the immense burdens the Jurisdictional Determination process employed by Corps imposes on landowners and the additional, and well-nigh insurmountable, barriers that would be imposed if landowners whose

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[11] As this Court noted in *Rapanos*, "[t]hese costs cannot be avoided," because the Clean Water Act "impose[s] criminal liability," as well as steep civil fines, "on a broad range of ordinary industrial and commercial activities." *Rapanos*, *id.*).

property has been deemed a jurisdictional "wetlands" had to go through the full permitting process before they could seek review by an impartial Article III court.

What is unduly burdensome for a business such as Respondent Hawkes in this case is unbearable and intolerable for the thousands of individuals whose property the CWA enforcement agencies claim to regulate, and do in fact regulate in draconian fashion.

SUMMARY OF THE ARGUMENT

The APA "'creates a presumption favoring judicial review of administrative action.'" *Sackett v. Envtl. Prot. Agency*, 132 S. Ct. at 1373 (quoting *Block v. Community Nutrition Institute*, 467 U.S. 340, 349 (1984)).

An "approved JD" changes the legal regime by determining that the property contains "waters of the United States," subject to federal control under the Clean Water Act, after a formal site-specific adjudication. Respondent concedes that an "approved" JD is the Corps' final finding as to federal jurisdiction.

The JD has practical and legal consequences for the regulatory agency – the Corps or the Environmental Protection Agency – and coercive effect on the property owner, who must either apply for and obtain an individual federal permit (at enormous cost), ignore the JD and proceed without a permit with improvements or other activity on the land and risk ruinous fines and

criminal liability, or abandon any use of the property after having spent substantial moneys, time and effort acquiring the land, having plans drawn up by architects, engineers and other professionals, and obtaining local and state permits.

Under *Bennett v. Spear*, 520 U.S. 154 (1997), this Court has generally required that an agency action have a particularized legal consequence in order to be reviewable by an Article III court. This Court has taken a practical approach in determining if the agency action changes the legal regime, or fixes a "right" or "obligation," even though the agency action does not have legal consequences independent of the underlying statute. An approved JD changes legal rights and obligations between the landowner and the federal government by determining, through a formal site-specific adjudicatory process, that a particular property contains "waters of the United States" subject to federal control under the Clean Water Act. The JD is conclusive as to federal jurisdiction. The JD has practical and legal consequences for

An approved JD has coercive effect on the property owner by compelling the owner to either apply for and obtain a permit at immense cost and after long delay (and often after agreeing to limitations on his use of the property or granting "conservation easements"), or proceed with the owner's intended use without a permit, exposing the owner to ruinous fines and criminal liability.

The requirement that a landowner submit to a separate (and largely redundant) permit process before seeking judicial review, as urged by the Corps, is duplicative and illogical. The permit process does not aid a court's review of the jurisdictional issue beyond the record already created during the exacting JD process.

There is no adequate remedy in court that justifies any further delay in judicial review. Seeking judicial review by violating the Clean Water Act to trigger an enforcement action imposes unacceptable risks and burdens on the landowner because the penalties for discharging a "pollutant" in wetlands without a permit are fines of tens of thousands of dollars a day and possible criminal liability. A process that requires an aggrieved party to risk devastating fines and imprisonment to challenge the validity of a regulation is unconstitutional and invalid on its face. See *Ex Parte Young*, 209 U.S. 123 (1908).

An approved JD should be deemed "final agency action" under the APA and subject to immediate judicial review

ARGUMENT

I.

THE EIGHTH CIRCUIT'S HOLDING THAT A JURISDICTIONAL DETERMINATION IS APPEALABLE TO AN ARTICLE III COURT ACCORDS WITH THIS COURT'S JURISPRUDENCE

The Administrative Procedure Act (APA) provides that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704. The APA "evinces Congress' intention and understanding that judicial review should be widely available to challenge the actions of federal administrative officials." *Califano v. Sanders*, 430 U.S. 99, 104 (1977).

a. An Approved Jurisdictional Determination is Final, Reviewable Agency Action.

Under the Administrative Procedure Act, "agency action" is final and subject to judicial review if it (1) represents the consummation of agency decision-making on the matter and (2) "must be one by which 'rights or obligations have been determined,'" or from which "legal consequences will flow " *See Bennett v. Spear*, 520 U.S. at 177-78. An agency action may be final if it determines "rights or obligations." *Sackett*, 132 S. Ct. at 1371.

Determining whether an agency action is "final" is a two part analysis: "First, the action must mark the 'consummation' of the agency's decisionmaking process" and second, "the action must be one by which 'rights or obligations have been determined,'" or from which "'legal consequences will flow'" *Bennett, id.* (citation omitted). The second branch of the *Bennett* test is disjunctive: the agency's action may final if it determines "rights" or "obligations," even if "legal consequences" do not flow from the action. In addition, there must be no other remedy in court other than APA review of the agency's action.

The Corps argues that its JD determination is not final agency action under *Bennett v. Spear* and that a landowner has an adequate remedy in court because the landowner can seek a permit, either be denied the permit or, if a permit is granted with conditions then decline the permit and seek redress in court for the Corps' JD decision. In other words, a landowner must go through the costly and time-consuming permit process – in addition to the already costly and time-consuming JD process – before a court can determine whether the landowner was required to go through the costly and time-consuming permit process. To state the Corps' desired process is to show how redundant and wasteful it is of all parties'

resources – the landowners', the agency's and the court's.[12]

The Revised JD satisfies the first Bennett criterion – it was the consummation of the Corps' decisionmaking process on the threshold issue of the agency's statutory authority. *See Belle Co., LLC v. U.S. Army Corps of Eng'rs*, 761 F.3d 383, 389-90 (5th Cir. 2014), *cert. pending* (No. 14-493); *Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586, 591-93 (9th Cir. 2008). The Corps concedes as much. Pet. Opening Brief at 26.[13]

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[12] Moreover, once an Approved JD has been issued, "the process of administrative decision-making has reached a stage where judicial review will not disrupt the orderly process of adjudication." *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatl.*, 400 U.S. 62, 70-71 (1970).

[13] The Corps' regulations provide that an Approved JD "constitute[s] a Corps final agency action." 33 C.F.R. § 320.1(a)(6). An Approved JD is a "definitive, official determination that there are, or that there are not, jurisdictional 'waters of the United States' on a site," and an Approved JD "can be relied upon by a landowner, permit applicant, or other affected party for five years." Corps Regulatory Guidance Letter No. 08-02, at 2, 5 (quotation omitted). Jurisdictional determinations and permitting decisions are discrete agency actions; a party may obtain a JD without seeking a permit, and may obtain a permit without seeking an Approved JD. *Fairbanks*, 543 F.3d at 593. *See* Pet.App. 9a.

The Eighth Circuit's decision flows from *Sackett*, in which this Court held unanimously that an assertion of federal jurisdiction, through the issuance of a compliance order, is "final" and subject to judicial review under the Administrative Procedure Act (APA), 5 U.S.C. §§ 702, 704. Like the compliance order in *Sackett*, the JD in this case has immediate and direct legal consequences. It is an adjudicative decision that applies the law to the specific facts of a case and is legally binding on the agency and the landowner.

The Court of Appeals correctly found that the Corps "exaggerat[ed] the distinction between an agency order that compels affirmative action," like the compliance order in *Sackett*, "and an order that prohibits a party from taking otherwise lawful action," such as an Approved JD. *Id.* at 11a.

b. An Approved Jurisdictional Determination Has Substantial and Direct Legal and Practical Consequences

The Corps' position that a JD is not reviewable because it has no independent coercive effect, is refuted by this Court's precedents. In *Frozen Food Express v. United States*, 351 U.S. 40 (1956), plaintiff sought judicial review of an Interstate Commerce Commission order declaring that certain agricultural commodities were not exempt from regulations requiring carriers to obtain a permit to transport. *Id.* at 41-42. The order "would have effect only if and when a particular action was brought against a particular carrier." *Abbott*

Labs. v. Gardner, 387 U.S. 136, 150 (1967). The Court nonetheless held the order was reviewable because the "determination by the Commission that a commodity is not an exempt agricultural product has an immediate and practical impact"; it "warns every carrier, who does not have authority from the Commission to transport those commodities, that it does so at the risk of incurring criminal penalties." *Frozen Food Express*, 351 U.S. at 43-44. A JD, which is a determination regarding a specific property, has an even stronger coercive effect than the order deemed final in *Frozen Food Express*, which was not directed at any particular carrier. In *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 70-71 (1970), the Court rejected as having "the hollow ring of another era" the contention that an "order lacked finality because it had no independent effect on anyone," citing *Frozen Food Express*. *See also Columbia Broadcasting System v. United States*, 316 U.S. 407 (1942) (regulations that alter and adversely affect appellant's contractual rights and business relations reviewable even without enforcement action).

The Corps' position that a landowner is not entitled to immediate judicial review of a JD, even though the JD is the agency's final word on the extent of federal jurisdiction with respect to the property in question, establishes a dangerous precedent. An approved JD has "an immediate and practical impact" on the property owner, profoundly affecting his rights. Further, as a practical matter, will make it impossible or

impractical for many landowners to resist unwarranted exercise of power by the regulatory agencies.

Under the Corps' approach, the landowner has three options: (1) engage in a costly, time consuming and very likely futile permitting process; (2) maintain the landowner's legal position that Corps does not have jurisdiction and proceed without a permit, risking ruinous fines and imprisonment[14]; or (3) abandon his planned use of the land and in many cases lose the property to tax liens. These are not reasonable options.

There is no certainty that the permit will be granted, or, if granted, would not be conditioned on impracticable or burdensome restrictions or "mitigation," including "voluntary" conservation easements or even "donation" of part of the property to conservation trusts. These monetary and other expenditures by the property owner

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[14] Unless exempt, discharge of a pollutant into jurisdictional waters is prohibited without a federal permit. *See* 33 U.S.C. §§ 1251(a), 1311(a), 1362(6). Failure to obtain a permit for such a discharge exposes the person responsible to severe penalties: a party who discharges dredged or fill material into "navigable waters" without obtaining a permit is subject to civil penalty of up to $50,000 per day (adjusted for inflation) and imprisonment for not more than one year for negligent violations, 33 U.S.C. § 1319(b), and criminal penalties of up to double the fine and imprisonment for up to three years, for knowing violations, *see* Pet.App. 6a; 33 U.S.C. § 1319; *see also*, *Sackett*, 132 S. Ct. at 1370.

would be unnecessary if a court ultimately were to overrule the Corps' assertion of jurisdiction.

The Corps's argument that an approved JD is merely advisory ignores that "in reality it has a powerful coercive effect." *Bennett*, 520 U.S. at 169, 117 S. Ct. 1154. An approved JD has that "powerful coercive effect" because, once it is issued, the landowner faces substantial legal and practical burdens. As noted above, the landowner's only options are to: (1) complete the permit process at immense cost and great delay, with no certainty of success[15]; (2) abandon her planned use of the property; or (3) proceed without a permit and incur severe civil and criminal liability.

A JD causes an immediate, unavoidable, and substantial deprivation of constitutionally protected property interests. Is not "abstract, theoretical, or academic," *Frozen Food Express*, 351 U.S. at 43-44 (1956) because it requires a

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[15] An approved JD entails a costly and extensive onsite investigation by the Corps and "[s]ignificant agency resources are necessary to perform the scientific and technical analysis required." Pet. Opening Brief at 24. Of course, if the Corps applies technical expertise, the landowner must do likewise if he is to dispute the findings of the agency's experts. "This is a unique aspect of the CWA; most laws do not require the hiring of expert consultants to determine if they even apply to you or your property." Pet. App. at 20a-21a (Kelly, J., concurring). *Amici* know this firsthand, having retained experts in a number of technical disciplines, at great expense, at the JD stage.

landowner to change her plans and conduct and has immediate economic and legal consequences. It compels the landowner to submit to an agency that exercises the discretion of an enlightened despot." *Rapanos*, 547 U.S. 715, 721 (Plurality opinion. Internal citations omitted.).

A JD is an adjudicative determination that requires a property owner to obtain a federal permit if he wishes to improve or modify his land.[16]

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[16] The Clean Water Act § 404(a), from which the Corps derives its permitting authority, provides "[t]he Secretary may issue permits. for the discharge of dredged or fill materials into the navigable waters at specified disposal sites." CWA § 502(7), 33 U.S.C. § 1362(7) defines the term "navigable waters" as "the waters of the United States, including the territorial seas." EPA and the Corps have defined "waters of the United States" in various ways, often quite expansively. This Court has rejected the agencies' broad definitions and has criticized the government for overreaching and abusing its power under the CWA. *See Rapanos v. United States*, 547 U.S. 715 (2006) (plurality holding that the agency's expansive interpretation of the CWA is overly broad and creates federalism problems.); *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (regulation of remote ponds exceeds statutory authority and raises constitutional questions.); and *Sackett*, 132 S. Ct. at 1375 (the "reach of the Clean Water Act is notoriously unclear" and that the regulators deem that "any piece of land that is wet at least part of the year" may be covered by the Act, "putting property owners at the agency's mercy." Alito, J. concurring.)

In *Rapanos*, the plurality defined "navigable waters" as

(continued...)

Simply depositing a bucket of gravel on a driveway

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[16](...continued)
traditional navigable waters (capable of use in interstate commerce) and nonnavigable but relatively permanent rivers, lakes, and streams, as well as abutting wetlands, with a continuous surface water connection to traditional navigable waters. 547 U.S. 715, 739-42. Justice Kennedy, in a concurring opinion took the position that the CWA covered wetlands with a "significant" physical, biological, and chemical connection to a traditional navigable water. *Id.* at 779. In practice, the EPA and the Corps assert broad federal jurisdiction over wetlands under either the *Rapanos* plurality's "continuous surface water" test or Justice Kennedy's "significant nexus" test. *See Definition of "Waters of the United States' Under the Clean Water Act,"* Proposed Rule, 79 Fed. Reg. 22188 (Apr. 21, 2014). The Corps and the EPA assert regulatory authority over much land in the United States through an expansive definition of jurisdictional waters, which they claim includes tributaries, ditches, ponds, ephemeral streams, drains, wetlands, riparian areas and "other waters." *See* Proposed Rule, 79 Fed. Reg. at 22262-63 (Apr. 21, 2014). This rule is being challenged in a number of cases. We have argued that the agencies' concept of their wetlands jurisdiction is overbroad.

The Corps has "deliberately left vague" the "definitions used to make jurisdictional determinations," giving District offices great latitude in defining "waters of the United States" on a case-by-case basis. *Rapanos*, 547 U.S. at 727-28.

Because of the agencies' proclivity to overreach in asserting jurisdiction, it is essential that a landowner have practical and prompt access to an independent, impartial court in which the landowner can preserve and protect his property rights by challenging the government's erroneous assertion of jurisdiction.

in a wetland areas without a permit is a violation. In effect, property owners are excluded from the regulated areas, just as *amici* herein have been excluded from completing repairs on an existing driveway or building their house for more than seven years to date.

The costs and delays inherent in the permit application process are prohibitive, *see Rapanos*, 547 U.S. 715, 721 (2006) (plurality opinion), and often will prevent the landowner from vindicating her property rights. If a property owner then has to sue to have her objections heard by a court, and the court ruled that the Corps' JD was factually incorrect or beyond its jurisdiction, the landowner will have been irreparably harmed.[17],[18]

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[17] As Justice Scalia recognized in *Thunder Basin Coal Co. v. Raich*, 510 U.S. 200, 220-21 (1994)(concurring in part and concurring in the judgment), "[C]omplying with a regulation later held to be invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs."

[18] In *Ex Parte Young*, 209 U.S. 123, 148 (1908) the Court held that requiring a party to bear "the burden of obtaining a judicial decision of such a question upon the condition that if unsuccessful he must suffer imprisonment and pay fines as provided in these acts" would be unconstitutional because it would effectively "close up all approaches to the courts." More recently, this Court ruled in *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007) that "Given this genuine threat of enforcement, we did not require, as a prerequisite to testing the validity of the law in a suit for injunction, that the plaintiff bet the farm, so to speak, by taking the violative

(continued...)

The requirement that a landowner endure a lengthy and expensive permit process in order to obtain impartial review by an Article III court renders the right to such review ephemeral for many property owners, especially individuals and small businesses. As a practical matter, only those who can afford to see the permit process through and bear the subsequent cost and delay of litigation – which can easily amount to hundreds of thousands of dollars and several years – with no prospect of recovering the substantial costs of that course of action – can ever be vindicated in court.[19]

The mere requirement that the landowner pursue the permit process to the end forces that owner to concede, at least for a substantial time, that the Corps has jurisdiction – the very issue in dispute. The process gives the agency overwhelming leverage to wrest "voluntary"

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[18](...continued)
action." *See also Thunder Basin*, 510 U.S. at 216, where this Court concluded that lack of judicial review is unconstitutional where "the practical effect of coercive penalties for noncompliance is to foreclose all access to the courts," and where "compliance is sufficiently onerous and coercive penalties sufficiently potent." These are precisely the risks and burdens imposed on a landowners who wishes to obtain judicial review of an approved JD.

[19] A JD limits uses of the property, undermines the owners' intended use of the property, increases costs and reduces the value of the property or makes it unmarketable. These burdens can effectively deprive the landowner of viable economic use of the property.

concessions from the landowner in the form of limitations on the owner's development rights or even transfer of a part of the acreage to a private "conservation" group that has gained favor with the agency.

Once the owner has been persuaded to "voluntarily" give up his rights in order to obtain a permit, it is no stretch to imagine that a court would find that the owner had suffered no injury at the hands of the agency, and thus the delayed right to a judicial determination of jurisdiction becomes nugatory.

Lack of immediate judicial review, combined with "the uncertain reach of the Clean Water Act and the draconian penalties imposed for the sort of violations alleged in this case leaves most property owners with little practical alternative but to dance to the EPA's [or to the Corps'] tune." *Sackett*, 132 S. Ct. at 1375 (Alito, J., concurring).

This Court's decision in *Sackett* reflects a concern that failing to permit immediate judicial review of CWA jurisdictional determinations would leave regulated parties unable, as a practical matter, to challenge those assertions. In *Sackett*, this Court held that a similar intolerable choice between surrendering development rights, knuckling under to the agency's demands, or risking massive civil and criminal penalties violates the due process requirements of the constitution.

The dilemma posed in this case of the right to contest jurisdictional determinations is no different, and affects tens of thousands of individual and small business property owners throughout the nation. The question presented by the petition for certiorari should be decided by this Court.

CONCLUSION

A proper analysis of ripeness and final agency action principles compels the conclusion that an Approved JD is subject to immediate judicial review.

For the foregoing reasons, *amici curiae* urge the Court to affirm the judgment of the Court of Appeals for the Eighth Circuit.

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Respectfully submitted,

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